Neutral Citation No. [2013] NIQB 118

Ref: **TRE9082**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **20/12/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Tadas Lapas' Application [2013] NIQB 118

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY TADAS LAPAS

AND

IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE ("NIPS") TAKEN ON 26 AUGUST 2011

AND

IN THE MATTER OF THE CONTINUED REFUSAL TO ALLOW TADAS LAPAS ACCESS TO OFFENDING-BEHAVIOUR WORK

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TREACY J

Facts

[1] The Applicant, a Lithuanian national, was a prisoner who was serving a fixed term sentence and an Extended Custodial sentence (ECS) concurrently.

[2] He had the prospect of release from extended custodial sentence on or around the 2nd February 2012 when a hearing before the parole commissioners was expected to be held.

[3] A parole dossier assessed the Applicant as a risk of serious harm to the public. It suggested certain offending behaviour work that he should undertake in order to reduce his risk and evidence this reduction to the parole commissioners.

[4] Despite this recommendation, such work was not provided to the Applicant for a significant period.

[5] The reason that such work was not provided was because he was not fluent in English and therefore he would not be able to engage in it.

[6] No alternative provision has been made for the Applicant. The alternatives suggested include allowing him to partake in group work with an interpreter or allowing him to do one to one work with an interpreter.

[7] In correspondence with the Applicant's solicitors the NIPS have stated that the use of an interpreter would be inappropriate for cognitive based group programs and that using an interpreter in group work would not be possible as it would disadvantage the other participants.

[8] The applicant submits that the prison service have not given any reason as to why he could not access behaviour work on a one to one basis or other adapted basis.

[9] On 22 October 2011, in the Applicant's sentence review, the Prison Service decided to provide the Applicant with some behaviour work (drug counselling and victim awareness sessions). An interpreter would be provided for same.

[10] The prison service will not however provide cognitive group work sessions (or any equivalent) and the applicant was not to be assessed for same until he achieved level 3 proficiency in English language which it was anticipated will not be for the foreseeable future.

[11] Ultimately the Applicant was unexpectedly released on parole before a decision was made in this application.

Relief Sought

[12] The relief sought in the Applicant's Order 53 Statement may be summarised as follows:

(i) A declaration that the decision of the Northern Ireland Prison Service dated 26th August 2011 refusing to allow the Applicant access to offending behaviour work was unreasonable, unlawful and void.

(ii) A declaration that the complete failure of the Northern Ireland Prison Service to provide the Applicant with access to offending behaviour work

from in or about 30 December 2010 until in or about 11 November 2011 was unreasonable, unlawful and void.

(iii) A declaration that the continuing failure of the Northern Ireland Prison Service to allow the Applicant access to appropriate cognitive behaviour work, such as Enhanced Thinking Skills ("ETS") or 1 to 1 equivalent is unreasonable, unlawful and void.

(iv) An order of mandamus requiring the Northern Ireland Prison Service to consider the question of provision to the Applicant of access to offending behaviour work in accordance with all proper principles of law and practice and taking into account all relevant factors.

(v) Damages in respect of all violations of the Applicant's Convention rights.

Grounds on which relief is sought

[13] The Applicant challenges the decision of the NIPS dated 26 August 2011 and its alleged failure to provide him with any offending behaviour work from in or about 30 December 2010 until approximately 11 November 2011 on the following grounds:

(i) In refusing to provide the Applicant with any offending behaviour work in the manner alleged the Respondent is discriminating against the Applicant in an area which falls within the ambit of Article 5 ECHR on grounds relating to the Applicant's status as a non-fluent English speaker in that relevant offending behaviour work is being provided to prisoners in situations similar to the Applicants where those prisoners are UK Nationals or are fluent in English.

(ii) The refusal to provide the Applicant with access to any offending behaviour work is an unjustified and disproportionate differentiation in treatment between analogous comparators in this context or alternately is a refusal to respect the principle of treating like cases alike and unalike cases differently.

(iii) The impugned decision and consequent refusals represent discrimination against the Applicant contrary to his rights under A14 ECHR read with A5 ECHR.

(iv) The aforementioned refusal to provide any offending behaviour work (including one-to-one work) is in any event irrational and disproportionate in that the provision of appropriate one-to-one work

with interpretative support is not impossible, nor inappropriate, nor would it disadvantage or complicate the work of other prisoners within a group session and in suggesting the contrary as justification for not providing any offending behaviour work the Respondent has fallen into error. As a result it has failed to properly consider the provision of appropriate one-to-one work with appropriate interpretative support.

(v) The refusal to provide any offending behaviour work (including one-to-one work) is in breach of the Respondent's public law duty to provide the systems and resources necessary to provide prisoners (including non-national prisoners or prisoners with poor English) with the reasonable ability to apply successfully for release in accordance with the provisions of the relevant statutory release scheme applicable in their cases.

(vi) In all the circumstances noted above where there has been a violation of the Applicant's rights under the Convention he should be awarded compensation in order to afford him just satisfaction.

(vii) For reasons similar to those stated above the Applicant furthermore believes that the ongoing refusal to provide the Applicant with access to any ETS course (or similar one-to-one equivalent) is equally unlawful and discriminatory.

Statutory Framework

The Criminal Justice (Northern Ireland) Order 2008

[14] Extended custodial sentence for certain violent or sexual offences:

> "14. - (1) This Article applies where –
>
> (a) A person is convicted on indictment of a specified offence committed after the commencement of this article; and
>
> (b) The court is of the opinion –
>
> (i) that there is a significant risk to members of the public of serious harm occasioned by the commission

by the offender of further specified offences, and

(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence.

(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of

(a) the appropriate custodial term; and

(b) a further period ("The extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences."

Duty to release prisoners serving indeterminate or extended custodial sentences

[15] Article 18 states:

18.-(1) This article applies to a prisoner who is serving...

…(b) an extended custodial sentence.

(2) In this Article -

'P' means a prisoner to whom this arrival applies;

'Relevant part of the sentence means -

…)b) in relation to an extended custodial sentence, one-half of the period determined by the court as the appropriate custodial term under Article 14.

(3) As soon as-

(a) P has served the relevant part of the sentence, and

(b) the Parole Commissioners have directed P's release under this Article, the secretary of state shall release P on licence under this Article.

(4) The Parole Commissioners shall not give a direction under paragraph (3) with respect to P unless -

(a) The Secretary of state has referred P's case to them; and

(b) they are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

Relevant Convention Provisions

[16] Art 5(1) ECHR states:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law

[17] Art 5(4) states:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[18] Art 14 ECHR provides:

> Prohibition of Discrimination
>
> The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Arguments

On behalf of the Applicant

[19] The refusal to provide the Applicant with offending behaviour work is irrational by virtue of taking into account irrelevant consideration. It is also disproportionate. The reasons for not using an interpreter in a group setting do not apply at all or do not apply to the same extent in a one to one situation. In taking these reasons into account to justify the refusal of all forms of offending behaviour work to the applicant, the respondent's decision was unreasonable.

[20] The refusal to provide the applicant with offending behaviour work is in breach of the respondent's public law duty to provide the systems and resources necessary to provide prisoners with reasonable ability to apply successfully for release in accordance with the provisions of the relevant statutory release scheme applicable as discussed in R (James) v Justice Secretary (2009) 4 All ER 255. The similarity between the scheme discussed in that case and the present scheme are sufficient to allow reliance on that case. It is a premise of the NI scheme that prisoners may be reformed. It is irrational to make such work a pre-condition of release, yet not to provide for such work to be done. Furthermore, it is irrational and unlawful not to provide this work to one section of the prison population (ie those who are not fluent in English).

[21] The refusal to provide the applicant with offending behaviour work is in breach of Art 5(4) ECHR read with Art14 ECHR. Any system of early release (and the right to seek early release where domestic law provides for such a right) falls within the ambit of Art 5 for Art 14 purposes. Any differential treatment of one prisoner as compared with another, otherwise than on the merits of their respective cases gives rise to a potential Art 14 issue. Offending behaviour work is a necessary step toward release as

offered by the scheme. The current practice either discriminates indirectly against foreign nationals or discriminates directly on other status ie fluency in English.

[22] Alternatively there is discrimination on the basis that like cases should be treated alike and unlike cases should not be treated alike.

[23] There is no justification for the discrimination. The discrimination is disproportionate and has no legitimate aim.

Respondent's Arguments

[24] It is disputed that there was any requirement in the original sentence plan to commence drug/victim work within a particular timeframe. It is disputed that the delay in commencing same amounts to a breach of public law duty or an act of discrimination.

[25] The offending behaviour programmes referred to in the original sentence plan relate to cognitive type work and not victim awareness or drugs work. The Original Sentence Plan (OSP) only envisages that the Applicant would attend offender behaviour programmes which were assessed as suitable for him by the psychiatrist within a 6 month period. The OSP makes no reference to a time frame for victim/drug work.

[26] The offender management unit put an emphasis on seeking to ensure that there were improvements in his English. Learning to communicate in English was identified by the OSP, an objective which of itself was necessary to address and reduce risk. It is appropriate for the Respondent to address English as a priority as it is a risk factor. As well as being an objective of itself, improvements in English were likely to be of benefit in helping to address other areas of work which had been identified. The people working with the applicant all emphasized the need to promote improvements in English before moving onto the other work which had been identified for him. The applicant got lots of help with his English. However, no significant improvement was made. Shortly thereafter arrangements were made for him to participate in victim/drug work. However, due to various reasons, this has not been possible.

[27] In the OSP it was not indicated that psychological or cognitive behaviour work was necessary in the Applicant's case. This omission is a deferral to the psychiatrist's expertise as to whether this work is necessary and what type of work is appropriate. This is the psychiatrist's job only. A number of factors have to be taken into account in determining suitability for offender behaviour programmes. The Applicant was not assessed for ETS as he did not meet the basic literacy requirements for same he was deemed unsuitable for same. There is no suggestion in the psychologist's report that

any other programme was relevant in the circumstances. In particular there was no recommendation of a 1 - 1 program.

[28] The Applicant appears to suggest that if the Respondent wished to insist on applying its literacy criterion for entrance into ETS it was bound to provide the Applicant with work of a similar type if he could not meet that criterion. The assessment of the psychologist was not for 1-1 work. Her consideration of the type of programme that might be suitable for the Applicant following satisfactory progress in English as a Second Oral Language ("ESOL") and further assessment was a very specific programme involving the dynamics of group work. It has not been explained how 1 - 1 work may be apt for the Applicant. ETS is not appropriate to be delivered with an interpreter. The revised plan did not suggest an alternative to ETS.

[29] In relation to irrelevant considerations being taken into account there is no evidence that there was a refusal of all forms of work. At no time was the respondent minded to refuse any treatment. The focus was on improving the applicant's ability in English. There was no requirement in the OSP to provide such work within the first 6 months.

[30] The court should be slow to regard as unreasonable an approach which gave priority to the English Language work, since such focus served the dual purpose of reducing risk, as well as affording the applicant a firmer footing upon which to move into the other areas of work in due course and to meet the threshold requirement for ETS.

[31] In relation to the public law duty argument, no analogy to James is appropriate in the instant case. No similar public law duty arises. If such a duty is found here there has been no breach. The Respondent has provided the applicant with various facilities to address and reduce risk. The applicant was found unsuitable for ETS. Therefore the failure to provide same cannot be a breach.

[32] In relation to the Art 14/Art 5 argument it is not disputed that the subject matter of this application falls within the ambit of Art 5. However, it is justified to insist that programme participants should have achieved a certain threshold in literacy. Due to the prisons location the ETS programme is delivered in English. Prisoners must be sufficiently competent in English in order to meaningfully engage with ETS.

[33] The contention that the Respondent should be making alternative provision for the Applicant in order to avoid a finding of discrimination requires careful consideration. It is submitted that the limits of the Respondents obligation lay in providing the Applicant with the resources necessary to afford him a reasonable opportunity to achieve the threshold standard in literacy.

[34] If he attends with an interpreter this would fall foul of the legitimate aim of endeavouring to provide an effective programme for others. It would not be feasible for an interpreter to work in this context.

[35] If it is submitted that the Respondent was obliged to make 1-1 provision in the first instance then there is no evidence that this would be suitable. The psychologist suggested ETS only. The legal basis for the submission that the Respondent was required to do more than provide the Applicant with resources to help him meet the literary standard for group work is unclear.

[36] The prison adopts an individual focussed approach to interventions and does not provide the same package of work to all. Thus, if a prisoner is not fluent and is assessed as unsuitable for a cognitive based group programme, it is not inevitable that the Respondent should substitute it with a 1 - 1 programme. This may or may not be necessary in the particular case.

[37] There is no evidence of any causative connection between the alleged discrimination and the Applicant's dwindling prospects of release.

Discussion

Preliminary Issue: Is it appropriate now, following the Applicant's release, to continue to consider this application for Judicial Review

[38] It is accepted by both parties that a dispute remains between the parties that will need to be resolved at some stage. Further there is a substantial foreign national prison population and it is not unlikely that similar issues may arise again. I consider that this application therefore does raise a point of some public interest. For these reasons, and to avoid further unnecessary delay I will exercise my discretion to give judgement.

Public Law Duty

[39] R (on the application of James) v Secretary of State for Justice [2009] 4 All ER 255 considered the continued lawfulness of imprisonment in circumstances where the Secretary of State had manifestly failed to provide prisoners who were serving an Imprisonment for Public Protection ("IPP") sentence with the facilities and services necessary to allow those prisoners to reduce their risk effectively, and to prove that they had reduced their risk to the Parole Board. In that case the Secretary of State conceded that the provision of such services and facilities was 'the premise of the legislation' and as such the failure to provide them represented a failure of the Secretary of State's public law duty under that sentencing scheme.

[40] I consider that Extended Custodial Sentences (ECS) are analogous to the IPP regime as far as relevant to the instant application. In the ECS regime, as in the IPP regime, there is a period during which release is dependent upon the satisfaction of the parole board that the prisoner in question no longer poses a serious risk to the public.

[41] As with the IPP regime, it is a premise of the 2008 Order that the prison will provide prisoners with a reasonable opportunity to demonstrate to the parole board that they are no longer a danger to the public.

[42] This 'premise' is reflected throughout the policy documents which guide the Prison Service in the implementation of the demands of the Criminal Justice (Northern Ireland) Order 2008.

[43] Some particularly relevant provisions of 'The Offender Management Practice Manual 2009' are explored below.

[44] At Section 7 (The Sentence Plan) Subsection 7.1 (Introduction to the sentence plan), the manual provides:

> 'The Sentence plan will…
>
> - Provide offenders with a clear pathway through custody in preparation where applicable for the parole process….
>
> - Recognise the diversity within the prison population and respond appropriately to address the needs and risks…
>
> Plans should be solution oriented, build on identified strengths of the individual and contain SMART objectives. They will be prioritised in terms of managing risk of serious harm as well as managing any likelihood of reoffending by….
>
> - Challenging offending behaviour through a spectrum of interventions'

[45] At 7.4 (Sentence Plan Conference Meeting) provision is made for a Sentence Plan Conference (SPC) in circumstances where, inter alia**, 'a responsivity issue has been**

identified'. A responsivity issue is an issue which may render a prisoner unsuitable for an intervention because s/he lacks the capacity to respond to the material. These issues include learning disabilities and language problems. The relevant section reads:

> "It is anticipated that some offenders will present with complex and difficult issues which cannot be easily incorporated into the Sentence Plan and will involve more input than that of the Case and Sentence Manager on their own to be able to reach agreement on the exact content of the sentence plan…..
>
> Offenders will be referred to this meeting if they meet the following criteria:
>
> …
> A responsivity issue has been identified (e.g. learning disability)"

[46] Section 12.1 deals with "Services to Offenders" and provides:

> Offenders may require a wide spectrum of services and support before they reach a point where they can meet the demands of a programme. This may include support in relation to literacy skills, interpersonal skills, self confidence and coping with addictions. The Case and Sentence Managers are tasked with assessing the risks and needs of each offender and identifying behaviour, attitudes or whatever needs to be addressed prior to participation in any form of intervention. It is their responsibility to refer the offender to the appropriate department of service provider in a planned, realistic and achievable sequence of stages. It is important therefore to understand programmes and interventions as a spectrum rather than a hierarchy.

[47] At section 12.3: OMG Programme Interventions Unit:

> "The second component of the OMG is the Programme Interventions unit, primarily concerned with the pre-assessment, delivery and evaluation of programmes that specifically address the cognitive thinking and underlying attitudes which inform the offender's

> motivation to offend….. NIPS programmes have traditionally consisted of a variety of types aimed at different problems experienced by a prison population….. The spectrum will address specific behavioural issues such as anger…. alcohol, … violence and drugs….
>
> These programmes are designed to reduce re-offending by helping offenders learn new skills that improve the way in which they think, conduct themselves and solve problems; it helps them cope with pressure and consider the consequences of their actions; it allows them to see things from the perspective of others; and to help reduce impulsive acts. Problems with attitudes and behaviour are among the most common characteristics of offenders. Approved and accredited programmes are an effective way of addressing them."

[48] There are further relevant passages in the second policy document: 'Assessing Suitability for Offending Behaviour Programmes - Risk, need and responsivity guidance for treatment managers'.

[49] In the introduction to that document the following appears:

> 'The presumption in each case is to include a person with the appropriate risk level and needs in treatment **by finding ways to make it possible for them to benefit**. Only when an offender has an inappropriate risk level for the programme should deselection be automatic.' [emphasis added]

[50] When considering a prisoner for an intervention there are various considerations which need to be taken into account, for example a risk assessment and needs assessment. A further essential consideration is the responsivity assessment. In the 'Responsivity assessment' section of this second guide the purpose of the responsivity assessment is described:

> 'The 'Responsivity Principle' states that for a programme to be effective, its mode of delivery must match the preferred learning styles and other diverse needs of the participants. That is, even when an offender is suitable for a programme based on a risk and need, the

programme may not be suitable for him/her, if the programme is not delivered in a way that s/he will respond to. By 'the programme', we mean both the material that makes up the intervention and the group environment of the intervention'.

[51] Immediately after the above this section continues:

> 'The Prison Service is **obliged** to provide for prisoners with different needs. TMs **must make all reasonable adjustments to ensure programmes are accessible to all those who could potentially benefit'**.**[emphasis added]**

[52] There is a section in this document which is specifically addressed to the language of prisoners and the effect that this may have on his responsivity to the programme:

> Language
>
> Does the individual speak and understand English well enough to be able to keep up with the programme? Accredited programmes are all presented in the English language.
>
> - What is the offender's current ability to understand verbal and written English?
>
> - Is there evidence from participation in other activities within the prison that can be used to inform your decision-making?
>
> - Is there an English language course available in the prison… that the offender could access before attending the programme?
>
> - Are the services of an interpreter or translator available at the establishment? If so, to what extent might this facilitate meaningful engagement in the group? You will also need to consider the impact of this on the overall effectiveness of the programme. Will the interpretation of programme concepts accurately

translate across languages? It is recommended that you begin by conducting assessment through a translator, which may assist you in making decisions about whether it would be possible to deliver the particular treatment programme via translation.[I interpose that it is not clear whether this was done in this case]

- It the difficulty primarily with written or verbal communication? Would translation of some written programme materials be sufficient to address offenders' needs in terms of language?

- Will the subtleties of programme concepts accurately translate across languages? You may need to discuss this with a bilingual advisor."[I interpose again that it is not clear that this was done in this case].

[53] There is a further section relating to literacy and responsivity:

> "Prisoners with poor literacy are still suitable for accredited programmes…. You can refer a prisoner to a literacy class before inclusion on a course only if this does not run the risk of him/her not having time to complete the accredited programme.
>
> - Is there time for the offender to access appropriate education classes to improve literacy levels before participating in the programme?"

[54] The document also notes in relation to prioritisation of programme places '**Prioritisation** of programme places **should strongly weight time left to serve**.'

Application of these Policies in the Applicants case

[55] In Mr Lapas' pre-sentencing report it is documented that Mr Lapas had been assessed as posing a risk of serious harm to others at a risk management meeting on 4th November 2010. The author of the report, a probation officer, concluded that:

> '... should Mr Lapas remain in Northern Ireland post-release, the likelihood of reoffending and potential for

future harm could be lessened if the defendant addressed the following issues:

- Attend and participate in alcohol/drug treatment as directed by PBNI

- Attend and participate in all offence-focused programmes of work as directed by PBNI'

[56] In Mr Lapas' sentence plan the following work was identified as 'required to address and reduce risk factors while in custody';

- Complete Offender Behaviour Programmes as identified by psychological assessments

- Engage in substance misuse programmes

- Attend ESOL classes to learn to communicate in English

- Address lack of victim empathy

- Attend workshops to learn new skills

[57] In Mr Lapas' Case Managers Report of 15th February 2011 at section 8 'Response to the sentence plan' the following appears:

'Sentence Plan includes recommendations

1. That he acquire sufficient English to benefit from group programmes.

2. That he complete offending behaviour programmes identified as suitable e.g. Enhanced Thinking Skills (ETS).

3. That he address victim issues.

4. That he engage in substance abuse programmes or counselling.

5. That he attend English language classes.

> He has agreed to all aspects of the sentence plan but as yet has been asked to engage only in English language classes which he has done. At present even most one-to-one work would require an interpreter.'

[58] Point 1 above does not seem to reflect anything that is recorded in the original sentence plan.

[59] On 22 February 2011 there is a document which notes a meeting to discuss Provision of Release plan for Dossier. It states:

> "Mr Lapas's [sic] sentence plan identified a number of areas of work which included English as a Second Oral Language, Substance abuse programmes and any other work recommended by Psychology.
>
> Psychology reported that due to his level of English it was not thought possible for him to engage in offence focussed work for the foreseeable future.
>
> It is the view of the panel that Mr Lapas has not completed sufficient work to decrease his level of risk at this point in his sentence. Given the seriousness of the offence he remains a risk until further work has been completed.'

[60] A psychology report was compiled on Mr Lapas on the 9th February 2011. In section 6 therein: 'Progress in risk related interventions' the psychologist notes:

> 'In assessing Mr Lapas' suitability to engage in Offending Behaviour Programmes, it was necessary to consider a range of factors including risk, need and responsivity alongside his readiness for treatment.
>
> Mr Lapas engaged with the Psychology Department in being assessed for the Enhanced Thinking Skills Programme (ETS). …
>
> Mr Lapas' first language is Lithuanian and it is my understanding that he has been assessed by the Education Department … against ESOL standards… He was assessed as Entry Level 1 to Entry Level 2 in

> speaking and listening skills and Entry Level 1 for reading and writing skills. Mr Lapas would be required to achieve at least Entry Level 3 in literacy before he could meaningfully engage with the ETS programme material and individual assignments.
>
> As such, Mr Lapas has been assessed as not suitable to participate in the Enhanced Thinking Skills programme at this time but will be reconsidered once his understanding of the English language and literacy level increases.'

[61] It would appear here that Mr Lapas was assessed for only one Offending Behaviour Programme, being the Enhanced Thinking Skills Programme, and further that refusal was automatic and based entirely on his language skills.

[62] In the section, 'Summary and Opinion', Ms Ruston's final paragraph stated:

> 'Whilst Mr Lapas has expressed his intention not to reoffend in the future and made some attempts to reflect on the reasons why he has offended, he would benefit from further intervention to develop his interpersonal problem solving skills and enhance his level of insight into the long-term impact of his offending on victims. In addition, Mr Lapas would benefit from engaging in a substance misuse programme or individual counselling with an organisation such as AD:EPT (Alcohol and Drugs Empowering People Through Therapy)'

[63] It would seem therefore that while he was assessed as unsuitable for ETS, other interventions were suggested.

[64] On 24 February 2011 an addiction report was compiled on Mr Lapas. This was compiled after only contact between Mr Lapas and the report's author. In the report it is noted that:

> 'Whilst in Maghaberry Mr Lapas completed one session of casework. However, it was difficult to progress with the work due to language barriers. It was not appropriate for an interpreter to be present.' Later in the same report it continues 'Mr Lapas was keen to engage in the AD:EPT programme of care. However, due to

> language barriers and limitations the work did not progress beyond the initial phase of work', and later again 'I would recommend that Mr Lapas has further contact with an addiction service. However, this may prove difficult to complete due to language restrictions'.

[65] The various assessments of Mr Lapas generated up to this point may be summarised as follows:

(i) Each assessment of Mr Lapas has confirmed that he is a prisoner who would benefit from several types of work including addiction work, offence focussed work, victim empathy work, and work to develop his interpersonal problem solving skills.

(ii) Those involved in his sentence management were aware as of 22 February 2011 that further work was required to reduce his risk level.

(iii) Mr Lapas engaged with psychology only in relation to the ETS programme. The psychology report did not assess him for other offence focussed work. The psychology report did suggest further interventions which he may have benefitted from.

(iv) Language barriers prevented further addiction work taking place. It was believed that it was not appropriate for an interpreter to be present at this stage at AD:EPT work sessions.

[66] On 18 May 2011, Mr Lapas' solicitors wrote to the Prison Governor expressing concern at Mr Lapas' failure to access programmes that would allow him to prove to the parole board that he no longer poses a risk to the Public.

[67] On 8 June 2011 the Governor responded. That letter states:

> **'**Your letter has clearly outlined the work your client is required to do and in the order in which that work is to be carried out'.
>
> It further states:
>
> 'Please note the use of an interpreter is inappropriate for cognitive based programmes'.

[68] On 5 July 2011 solicitors for the Applicant wrote to the Governor to ask why the use of an interpreter is inappropriate in cognitive based programmes. To this the Governor responded

> 'I understand it would not be possible for a facilitator via an interpreter to challenge, support and correctly interpret a reaction/response from a prisoner to a facilitator or a member of a group correctly. As you cannot guarantee the interpreter will communicate the correct tone/inflection of everyone in the group. Asking the interpreter to interpret all comments from all the participants will only lead to misinterpretation and causing incorrect feedback and assessment of the individuals understanding and progress.'

[69] On 26 August 2011 Professor Jackie Bates-Gaston responded to the pre-action correspondence and noted that:

> 'The use of an interpreter in cognitive behaviour group programmes is inappropriate for reasons outlined previously in Governor Woods correspondence of the 14th July.'

The correspondence of 14th July had referred to all cognitive work and not just cognitive work taking place in a group.

[70] In October 2011 adjustments were made to Mr Lapas sentence plan and 1 to 1 sessions in relation to drug counselling and victim awareness were made available.

Comparison of Policy Principles and Application of Policy to the Applicant

[71] In the first instance it is important not to close one's eyes to the reality that a prisoner who has the fluency of a young child in the English language is different, and requires a different approach from a prisoner fluent in the English language. It is accepted that there is little point in using resources to provide facilities that will not benefit that prisoner. It is acceptable to consider the effect of lack of fluency on the effectiveness of the programme. These are practical considerations which cannot be awarded. However, in complying with these practical considerations it is not acceptable to undermine the stated principles and overarching rules of the relevant policy documents. These principles and rules include the following:

[72] There is a presumption that prisoners should be included in interventions.

[73] Deselection should only be automatic if the risk level is inappropriate for the intervention.

[74] Treatment managers are obliged to provide all reasonable adjustments to ensure programmes are accessible to all those who could potentially benefit.

[75] It is acceptable to refer a prisoner to a literacy class first but not if it runs the risk of him not having time to complete the programme.

Conclusion

[76] It is clear from the above that Mr Lapas' language barriers acted to exclude him from work which was at all stages assessed as necessary to allow him to prove a reduction in the risk he was assessed to pose. There does not appear to have been any consideration of how to provide Mr Lapas with access to the facilities and services which would have given him a reasonable ability to prove his reduction in risk. This is borne out by the parole commissioners' decision of 18th January 2012 where it is stated:

> '... Mr Lapas is still assessed as presenting a high risk of reoffending and a significant risk of causing serious harm and that he had not completed the work that is considered necessary to reduce these risks' (emphasis added).

[77] It is clear from the NIPS policy documents that those involved in Offender management should provide services and interventions in a 'Planned, realistic and achievable sequence of stages' which is what the respondent argues happened in the case of Mr Lapas, i.e. that achievement of Level 3 in English was the first stage in a planned sequence. Assuming that this is the case (although there is no clear contemporaneous documentation which evidences any such plan), the internal policy was still breached in that there was immediate deselection based on level of English. There was still a failure to provide all reasonable adjustments to ensure that the programmes were accessible to Mr Lapas. And, crucially, based on his language ability alone, and the automatic deselection from programmes resulting from this, on the 22 February 2011, in the meeting to discuss Provision of Release Plan for Dossier (which proceeded on the premise that the parole date would be in May 2011) it was decided that Mr Lapas had not completed sufficient work to decrease his risk and therefore no release plan was required to be prepared for the parole dossier. That is, there was recognition of the work required and the short time in which it was required to be completed but the ongoing failure or refusal to provide him with a reasonable opportunity to prove that he had reduced his risk continued.

[78] For these reasons I hold that NIPS breached their public law duty to the Applicant.

Discrimination (Art 5 /Art 14)

[79] Under the terms of Mr Lapas' Extended Custodial Sentence he was technically eligible for parole as of 31 May 2011. However, he was also serving a concurrent Determinate Custodial sentence from which he was to be automatically released on licence on 2 February 2012. Therefore the earliest date in practical terms on which he was eligible for release was the 2nd February 2012. If he failed to achieve parole from 2nd February 2012 the custodial element of his ECS was to expire on the 29 November 2012 whereupon he would be released on licence without the input of the parole board.

[80] Therefore between 2 February 2012 and 29 November 2012 there was in effect an 'early release scheme' opportunity, access to which depended on the Parole Board being satisfied that Mr Lapas' did not pose a risk of serious harm to the public. The test which the Parole Board must apply is set out in Art18(4)(b) of the Criminal Justice (NI) Order 2008. This states that the Parole Board is satisfied 'that it is no longer necessary for the protection of the public from serious harm that [the Applicant] be confined'.

[81] The parole board, in coming to their decision under Article 18(4) (b) must take into account all information that is before it including the contents of the parole dossier which includes pre sentence reports, sentence management plan, various key worker reports.

[82] There are indications in various documents that several key workers who assessed Mr Lapas considered that his initial assessed risk level could be reduced if the applicant addressed certain issues by participating in alcohol/drug treatment and offence-based programmes. These views are set out in the discussion above.

[83] From the outset and for a period of 13 months there was a complete failure to provide Mr Lapas with any of the programmes identified due to his lack of ability in English. (In the parole commissioners recommendation it was noted that there had been one session of victim awareness work performed to date. Mr Lapas' sentence review of 22 October 2011 decided that one to one work should be made available to Mr Lapas in victim awareness and drug work however only one session seems to have actually taken place in the intervening 3 months).

[84] In the Parole Commissioners direction of 18 January 2012 the following comments are made:

'(a) While I accept that he has begun to demonstrate some victim empathy, his work in this area is still at an early stage.

(b) He has done no offence-related work in connection with his propensity for instrumental violence nor has he addressed those other risk factors which may have been targeted by ETS and comparable programmes. In their representations on his behalf, Mr Lapas's solicitors make the point that this in not through any unwillingness on his part to complete such work but is a consequence of his current level of English. I acknowledge the truth of this argument but the fact remains that Mr Lapas is still assessed as presenting a high risk of re-offending and a significant risk of causing serious harm and that he has not completed the work that is considered necessary to reduce these risks.

(c) It is to be hoped that work with AD:EPT can commence in the near future. If it has not done so already, but as of now I would consider that drug misuse remains and active risk factor.

(d) Taking all the above matters into account, I am not satisfied that Mr Lapas's confinement is no longer necessary to protect the public from serious harm and I therefore do not direct his release under para 18(3)(b) Criminal Justice (Northern Ireland) Order 2008.'

[85] On this basis Mr Lapas would remain detained on foot of his ECS until the end of the custodial period for reasons which all derive from his not having accessed sufficient offending behaviour work due to his lack of proficiency in English.

[86] In R (on the application of Clift) v Secretary of State for the Home Department [2006] UKHL 54 it was held that:

'The right to seek early release, where domestic law provided for such a right, was within the ambit of art 5 of the convention, and differential treatment of one prisoner

> as compared with another, otherwise than on the merits of their respective cases, gave rise to a potential complaint under Art 14. There was a close relationship between the statutory rules providing for early release and the core value which article 5 existed to protect. The law of England and Wales provided, in respect of a long-term determinate prisoner, at the relevant time, for a time at which … a prisoner had to be released, and an earlier time at which he might be released if it was judged safe to release him. Neither the public interest nor the interest of the offender was well served by continuing to detain a prisoner until the end of his publicly pronounced sentence; in some cases those interests would be best served by releasing the prisoner at the earlier, discretionary, stage, and in those cases prisoners should regain their freedom, even if subject to restrictions, because there was judged to be no continuing interest in depriving them of it. Moreover, the European Court of Human Rights and the Commission had consistently recognised the possibility of a claim under Art 14 in relation to Art 5, where a parole scheme was operated in an objectionably discriminatory manner.'

[87] Lord Bingham, in Clift quoted from Stec v UK (2005) 41 BHRC 84 in relation to Article 14:

> 'The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the Convention Articles….. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each state to guarantee. It applies to those additional rights, falling within the general scope of any Convention article for which the State has voluntarily decided to provide.'
>
> i.e.…. 'A situation in which a substantive convention right is not violated, but in which a personal interest close to the core of such a right is infringed … the court is

> required to consider, in respect of the convention right relied on, what value that substantive right exists to protect. The appellants invoke Art 5. There is no doubt what value Art 5 exists to protect. It is the fundamental right to liberty and personal security… the presumption… is in favour of freedom.'

[88] At para17 of Stec the judge continued:

> 'The convention does not require member states to establish a scheme for early release of those sentenced to imprisonment. Prisoners may, consistently with the convention, be required to serve every day of the sentence passed by the judge or be detained until a pre-determined period or proportion of the sentence has been served if that is what domestic law provides. But this is not what the law of England and Wales provided, in respect of long-term determinate prisoner, at the times relevant to these appeals. That law provided for a time at which ... a prisoner must as a matter of right be released, and an earlier time at which he might be released if it was judged safe to release him but at which he need not be released if it was not so judged.'

[89] And at para18:

> 'I accordingly find that the right to seek early release, where domestic law provides for such a right, is clearly within the ambit of Art 5, and differential treatment of one prisoner as compared with another, otherwise than on the merits of their respective cases, gives rise to a potential complaint under Art 14.'

[90] In Clift Lady Hale quoted from Marckx v Belgium (1979) 2 EHRR 330:

> 'Article 14 safeguards individuals who are 'placed in analogous situations' against discriminatory differences of treatment … For the purposes of Article 14, a difference of treatment is discriminatory if it has 'no objective and reasonable justification' that it if it does not pursue a 'legitimate aim' or if there is not a 'reasonable

> relationship of proportionality between the means employed and the aim sought to be realised.'

[91] Based on this reasoning I find that the facilities and services which are provided to allow an ECS prisoner a reasonable opportunity to prove to the parole board that his level of risk has reduced fall within the ambit of Art5. I also find that the Applicant was discriminated against in the access to these facilities and services in that he was placed in an analogous position to other prisoners and was treated differently based on his 'other status' of lacking fluency in the English language in circumstances where there was no 'objective and reasonable justification' for this difference in treatment and in fact where this treatment offended NIPS own internal policy.

[92] Save for the issue of damages the complaint of discrimination adds little to the finding that I have already made that the respondent breached its public law duty by failing to provide the applicant with a reasonable opportunity to demonstrate risk reduction. I consider that the findings of the court constitute just satisfaction and therefore make no award of damages.

[93] In R (on the application of Gill) v Secretary of State for Justice [2010] EWHC 364 (Admin) it was held that:

> 'Offending behaviour programmes are neither a necessary nor sufficient condition for release from prison. There are other recognised pathways to reduce re-offending and to achieve release. Yet offending behaviour work has been identified as an avenue to these goals for this claimant. The effect of the Secretary of State's decisions as I have described them in this judgement has been that the claimant has not been able to access any offending behaviour work. In my judgement steps should have been taken so that he could be provided with some type of offending behaviour work to give him the opportunity to demonstrate, eventually, his safety for release. Other steps have been taken, and assistance provided, but nothing comparable to offending behaviour work. It is clear to me that this failure cannot be justified. In the circumstances of this claimant's case the Secretary of State has unlawfully breached the statutory duty imposed on him to take steps so that his practices, policies and procedures do not discriminate against this intellectually disabled prisoner.'

[94] The instant case traverses similar territory as in Gill.

[95] For the reasons above I consider that Mr Lapas' has been discriminated against in relation to his Art5 rights when read with Art14 and that this finding constitutes just satisfaction.

Irrationality

[96] See R (on the application of James) v Secretary of State for Justice [2009] 4 All ER 255 in which it is stated at para 44:

> 'Cawser's case established that ... it would be irrational to have a policy of making release dependent upon a prisoner undergoing a treatment course without making reasonable provision for such courses.'

[97] In addition to, and supported by, the other grounds, it is clear that release, in the applicant's case was dependent upon him completing work that would allow him to demonstrate a reduction in risk. It is further clear that no reasonable provision was made for his access to such courses. Therefore it follows that the decision not to give access to these courses, and the continued failure to do so, was irrational.